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In the

Supreme Court of the United States

October Term, 1997

DEBORAH WEST, *et al.*,
Petitioners,

v.

DAVID L. LYNN, JR., *et al.*
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

AMICI CURIAE BRIEF OF THE STATES OF KANSAS, ALABAMA, IDAHO, IOWA, KENTUCKY, LOUISIANA, MASSACHUSETTS, MONTANA, NEBRASKA, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA AND WISCONSIN IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

1. May a state both collect a tax and impose a punishment on possession of a controlled substance without violating the Double Jeopardy Clause?

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AMICI CURIAE BRIEF OF THE STATES OF KANSAS, ALABAMA, IDAHO, IOWA, KENTUCKY, LOUISIANA, MASSACHUSETTS, MONTANA, NEBRASKA, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA AND WISCONSIN IN SUPPORT OF THE PETITION FOR CERTIORARI

The States of Kansas, Alabama, Idaho, Iowa, Kentucky, Louisiana, Massachusetts, Montana, Nebraska, Oklahoma, Rhode Island, South Carolina and Wisconsin respectfully file this brief *amici curiae*, pursuant to Supreme Court Rule 37.4. The brief is submitted in support of the petition for writ of certiorari filed in this case by the State of North Carolina.

INTEREST OF *AMICI CURIAE*

Kansas and its sister states have a direct interest in North Carolina's petition because the decision below either threatens each state's past and future collection of a drug tax against persons prosecuted for possession of illegal drugs or constrains state legislatures from adopting such a tax

altogether. The legislatures of twenty states have enacted some form of a tax on illegal substances.[1] The court of appeals has now made criminal a class of statutes state legislatures have intended as civil. That court also failed to take into account whether the North Carolina legislature has indicated either expressly or impliedly an intent to establish the tax as a civil or criminal penalty, undermining this Court's decision in *Hudson v. United States*, 522 U.S. ___ at ___, 118 S. Ct. ___ at ___, 139 L. Ed. 2d 450 at 459 (1997).

The court of appeals' decision forces states to choose between collecting revenue from drug dealers through a drug tax or prosecuting the dealers for possession of illicit drugs. It does not permit a state to do both in separate proceedings

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[1] ALA. CODE § 40-17A-1 to § 40-17A-16 (1993 and Supp. 1997); CONN. GEN. STAT. § 12-650 to § 12-659 (1993 and Supp. 1998); GA. CODE ANN. § 48-15-1 to § 48-15-11 (1995); IDAHO CODE § 63-4201 to § 63-4211 (1996); IND. CODE. ANN. § 6-7-3-1 to § 6-7-3-20 (Michie 1996); IOWA CODE § 453B.1 to § 453B.16 (Supp. 1998); KAN. STAT. ANN. § 79-5201 to § 79-5212 (1997); KY. REV. STAT. ANN. § 138.870 to § 138.889 (1998); LA. REV. STAT. ANN. § 47:2601 to § 47:2610 (Supp. 1998); MASS. GEN. LAWS ANN. ch. 64K, § 1 to § 14 (Supp. 1998); MINN. STAT. § 297D.01 to § 297D.14 (1991); NEB. REV. STAT. § 77-4301 to § 77-4316 (1996); NEV. REV. STAT. ANN. § 372A.010 to § 372A.130 (1997); N.C. GEN. STAT. § 105-113.105 to § 105-113.113 (1997); OKLA. STAT. tit. 68, § 450.1 to § 450.9 (1992 and Supp. 1998); R.I. GEN. LAWS § 44-49-1 to § 44-49-10 (1995); S.C. CODE ANN. § 12-21-5010 to § 12-21-6050 (1997); TEX. TAX CODE ANN. § 159.001 to § 159.206 (West 1992 and Supp. 1998); UTAH CODE ANN. § 59-19-101 to § 59-19-107 (1996); WIS. STAT. ANN. § 139.87 to § 139.96 (West 1995-96 and Supp. 1997-98).

without violating the Double Jeopardy Clause. As a consequence, either an important source of revenue will be lost[2] or dangerous drug defendants will escape prosecution.

STATEMENT OF THE CASE

Amici States agree with petitioner North Carolina's Statement of the Case and adopt it as if set forth fully here. *Amici* stress only the following points:

In 1996, the North Carolina Court of Appeals held that "the North Carolina Controlled Substance Tax does not have such fundamentally punitive characteristics as to render it

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[2] States have a legitimate and compelling interest in raising revenue by taxing drug activity. State and local governments spend an estimated $15.9 billion each year on investigating, apprehending, prosecuting and incarcerating persons dealing in controlled substances. OFFICE OF NATIONAL DRUG CONTROL POLICY WHITE PAPER, STATE AND LOCAL DRUG SPENDING ON DRUG CONTROL ACTIVITIES, p. 3 (October, 1993).

State and local economies also bear the economic burden of the consequence of drug activity, such as the treatment of substance abuse, costs associated with the destruction of property and crime, productivity loss as a result of drug abuse, and treatment of AIDS attributable to drug abuse. For example, in 1990, these costs for the State of Iowa were estimated to be over $732 million. IOWA DEPARTMENT OF PUBLIC HEALTH, DIVISION OF SUBSTANCE ABUSE, SOCIETAL COSTS OF SUBSTANCE ABUSE IN IOWA (1995), relying on INSTITUTE FOR HEALTH POLICY, BRANDEIS UNIVERSITY FOR THE ROBERT WOOD JOHNSON FOUNDATION, SUBSTANCE ABUSE: THE NATION'S NUMBER ONE HEALTH PROBLEM (October, 1993).

violative of the prohibition against multiple punishments for the same offense contained in the Double Jeopardy Clause." *State v. Ballenger*, 472 S.E.2d 572, 575 (1996), *aff'd per curiam*, 481 S.E.2d 84 (1997), *cert. denied*, __ U.S. __, 118 S. Ct. 68 (1997). In its *per curiam* decision, the North Carolina Supreme Court distinguished North Carolina's tax from the one this Court examined in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994), on the grounds that (1) North Carolina's tax is not predicated upon whether the taxpayer has been arrested or charged with criminal conduct, and (2) the tax is not assessed on property that has been confiscated or destroyed. Under *Ballenger*, the state could and did civilly assess and collect controlled substance taxes, and in an independent criminal proceeding prosecuted drug dealers for possession of drugs for which they had been taxed.

In 1998, the United States Court of Appeals for the Fourth Circuit addressed the question of whether North Carolina's tax is a criminal penalty, and with only passing reference to *Ballenger*, decided the issue contrary to it. The court of appeals concluded that the tax is based on a criminal act and has no relationship to lawful possession of the taxed substance. As a consequence, it held that North Carolina's tax on possession of controlled substances is a criminal penalty, requiring adherence to all the constitutional safeguards of criminal proceedings. The state stopped enforcing its drug tax on the day the court of appeals rendered its decision.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF SEVERAL STATE COURTS OF LAST RESORT.

The United States Court of Appeals for the Fourth Circuit has entered a decision on a question of constitutional criminal law which directly conflicts with an existing decision of the highest court of the State of North Carolina and the highest courts of the states of Alabama, Connecticut, Iowa, Kansas, Oklahoma, and South Carolina.[3] The state courts have held that a state may levy a civil tax on illicit drugs and independently criminally prosecute the person who possessed those drugs. Petitioner North Carolina explains well these existing conflicts, and they will not be restated here. In order

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[3] *Wilhite v. State*, 689 So. 2d 221 (Ala. Crim. App. 1996), *cert. denied*, (Ala. 1997); *S.H.J. v. State Dep't of Revenue*, 682 So. 2d 1354 (Ala. Civ. App. 1995), *cert. denied* (Ala. 1996); *Milner v. State*, 658 So. 2d 500 (Ala. Civ. App. 1994), *cert. denied* (Ala. 1995); *Covelli v. Commissioner of Revenue Servs.* ("*Covelli I*"), 668 A.2d 699 (Conn. 1995), *vacated and remanded sub nom. Covelli v. Crystal*, ___ U.S. ___, 116 S. Ct. 2577 (for further consideration in light of this Court's decision in *United States v. Ursery*, 518 U.S. ___, 116 S. Ct. 2135 (1996)), *aff'd per curiam on reconsideration, Covelli v. Commissioner of Revenue Servs.* ("*Covelli II*"), 683 A.2d 737 (Conn. 1996), *cert. denied, Covelli v. Crystal*, ___ U.S. ___, 117 S. Ct. 1445 (1997); *State v. Lange*, 531 N.W.2d 108 (Iowa 1995); *State v. Gulledge*, 896 P.2d 378 (Kan. 1995); *Hill v. State*, 898 P.2d 155 (Okla. Crim. App. 1995); *McMullin v. South Carolina Dep't of Revenue and Taxation*, 469 S.E.2d 600 (S.C. 1996).

to resolve this conflict between state and federal court interpretation of the same question of constitutional criminal protection, this Court should grant the State of North Carolina's petition for writ of certiorari.

II. THE COURT OF APPEALS MISAPPLIED *KURTH RANCH* IN ERRONEOUSLY CONCLUDING THAT A STATE'S ASSESSMENT OF A DRUG TAX IS ALWAYS A CRIMINAL PENALTY.

The critical factor that led this Court to conclude that Montana's drug tax was motivated by a penal and prohibitory intent was that the taxpayer was obligated to pay the tax only upon arrest. Montana's Drug Tax Act and accompanying administrative rules provided for no other possible circumstances under which the tax was to be assessed and paid. "The Montana tax was unique in that it was conditioned on the commission of a crime and was imposed only after the taxpayer had been arrested: thus, only a person charged with a criminal offense was subject to the tax." *United States v. Ursery*, 518 U.S. 267, 282 (1996).

Under the statutes of Alabama, Connecticut, Idaho, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Nebraska, Oklahoma, South Carolina, Utah, and Wisconsin,[4] as

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[4] ALA. CODE § 40-17A-4 (1993 and Supp. 1997); CONN. GEN. STAT. § 12-651(c)(1993 and Supp. 1998); IDAHO CODE § 63-4203 (1996); IOWA CODE § 453B.3 (Supp. 1998); KAN. STAT. ANN. § 79-5204(d)(1997); KY.

well as North Carolina, persons subject to the tax are those engaging in illegal drug activities, *e.g.*, possession or sale of illicit drugs. Taxpayers are obligated by statute to pay the tax regardless of their arrest for the illegal activity. Indeed, the North Carolina statute provides that taxpayers may pay the tax without risk of arrest.

The court of appeals attempts to avoid this crucial distinction by cavalierly stating that "the theoretical possibility that a drug dealer could pay the tax does not take the tax out of the criminal penalty category. The unused statutory reporting and payment scheme, while clever, is not enough to distinguish *Kurth Ranch*." *Lynn v. West*, 134 F.3d 582, 591 (4th Cir. 1998). Ignoring this important distinction results in no state drug tax being able to pass muster under *Kurth Ranch*, because all will be characterized as criminal penalties under the Fourth Circuit's flawed analysis.

REV. STAT. ANN. § 138.870(4)(1998); LA. REV. STAT. ANN. § 47:2602(2) (Supp. 1998); MASS. GEN. LAWS ANN. ch. 64K, § 1 (Supp. 1998); MINN. STAT. § 297D.04 (1991); NEB. REV. STAT. § 77-4302(1996); OKLA. STAT. tit. 68, § 450.3 (1992 and Supp. 1998); S.C. CODE ANN. § 12-21-6020(B)(1997); UTAH CODE ANN. § 59-19-102 (1996); WIS. STAT. ANN. § 139.87 (2) (West Supp. 1997-98).

III. THE COURT OF APPEALS' ERRONEOUS DECISION COULD HAVE THE UNDESIRABLE CONSEQUENCE OF THE RELEASE OF DRUG DEALERS NOW IN CUSTODY, BASED ON PRINCIPLES OF DOUBLE JEOPARDY.

One of the most disturbing aspects of the court of appeals' decision is that states face the specter of the potential release of thousands of drug dealers from prison based on the erroneous decision of the court of appeals. Drug dealers in custody who were assessed the drug tax and prosecuted for possession of drugs may be released on Double Jeopardy principles on the ground that prosecuting them criminally after collecting the drug tax amounts to a double punishment for the same offense. 28 U.S.C. § 2254. Unless this Court grants the petition for writ of certiorari, the court of appeals' interpretation of *Kurth Ranch* will stand as a reasonable application of federal law, which may result in serious consequences to states in their responses to federal habeas petitions. 28 U.S.C. § 2254(d)(1).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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